IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5059 OF 2004

Shri Mahalaxmi Construction Corporation & Ors..... .. Petitioners.

Versus

Shri Pandurang Ramchandra Kadam..... Respondent.

Mr. Amit B. Borkar for the Petitioners.

Mr. Dilip Bodake for the Respondent.

CORAM : S. A. BOBDE, J.

DATED : JANUARY 20, 2005.

P.C.:

The Petitioners, who filed a suit for accounts against the respondent, has challenged the order of the 5th Jt. Civil Judge, Junior Division, Kolhapur refusing to condone the delay in filing an application for restoration of the suit and for setting aside an exparte decree passed against the petitioners on the defendant’s counter claim.

2. The suit was filed on 3rd August, 1990. On 27th June, 1994 the respondent filed a written statement.

He also filed a counter claim. On 2nd December, 1994 the original plaintiff D. D. Shinde expired. It is the defendant who filed an application for bringing his legal representatives on record on 1st March, 1995. It appears that the summons were served on the plaintiff's firm, in particular on Ravindra Shinde, who was one of the partners of the firm. On 13th March, 2000 the suit was dismissed in default. On 31st October, 2000 the counter claim was decreed. The petitioners applied for restoration of the suit and for setting aside the exparte decree on 3rd September, 2001. Thus the petitioners' application was delayed by a period of 9 months and 4 days in setting aside the exparte decree and by a period of 17 months and 21 days in restoration of the suit.

3. The petitioners approached the court for restoring the suit and for setting aside the exparte decree passed on the counter claim on a plea that they came to know about the order and decree passed in Regular Civil Suit No. 1143 of 1991 and the counter claim on 3rd August, 2001. This has been disbelieved by the court below on the basis of the bailiff's report, Exhibits 33, 34 and 36. The respondent has filed bailiff's report before this Court.

4. A perusal of the bailiff's report shows that on 18th October, 1999 one Ravindra Shinde i.e. partner in the plaintiff's firm accepted summons in the counter claim. The bailiff's report further shows that the said Ravindra Shinde, who is plaintiff 1(A) accepted service on behalf of himself and on behalf of 1(B) and 1(D). The bailiff's report further makes an endorsement that plaintiff No.1(C) was not found since she was residing at Pune. In any case, having regard to the fact that the suit was filed by the firm and the counter claim was also filed against the firm, the acceptance of summons in the counter claim by Ravindra Shinde constitutes a good service on the firm. In any case, this fact of service belies the claim of the petitioners that they got knowledge of the proceedings i.e. the counter claim on 3rd August, 2001. It is obvious that they approached the court with a statement which was found not to be true.

5. Having regard to the above circumstances, I find no error of law apparent on the face of the record committed by the learned trial Judge in taking the view that the petitioners have not made out sufficient cause for condonation of delay. The sufficiency of the cause must be both genuine and valid and not as made out by the plaintiffs in the present case which

is found not to be true.

6. In this view of the matter, I see no reason to interfere with the impugned order. This writ petition is, accordingly, dismissed.

Sd/-

S. A. BOBDE, J.